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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO GUTIERREZ,

Defendant and Appellant.

A109915

(Solano County Super. Ct.
Nos. FCR196523, FCR212699)

In case No. FCR196523, Ernesto Gutierrez appeals from a judgment upon a jury verdict finding him guilty of stalking in violation of a restraining order (Pen. Code,¹ § 646.9, subd. (b)). He also appeals from a judgment following a jury verdict in case No. FCR212699 finding him guilty of assault with a deadly weapon (§ 245, subd. (a)(1)), false imprisonment by violence (§ 236), corporal injury to a spouse (§ 273.5, subd. (a)), and dissuading a witness (§ 136.1, subd. (b)(1)). The cases were consolidated for sentencing. The trial court sentenced defendant to the aggregate term of five years in state prison consisting of the upper term of four years for the assault offense and a consecutive term of one year for the stalking count. Defendant contends that imposition of the aggravated term violated *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403; 124 S.Ct. 2531] (*Blakely*). We affirm.

I. FACTUAL BACKGROUND

The convictions in this case stem from domestic violence incidents involving defendant and his wife. In case No. FCR196523, on May 21, 2002, defendant was placed

¹ All further statutory references are to the Penal Code.

on probation for three years on conditions including that he serve one year in the county jail. On August 25, 2003, defendant committed the offenses that were the subject of case No. FCR212699 by assaulting his wife with scissors and causing her to suffer a fractured tailbone. The trial court imposed sentence in both cases on March 3, 2005. The court denied defendant probation, finding that the nature of the offense was more serious than other instances of the same crime, that he inflicted severe physical and emotional injury on the victim, that his prior criminal record consisted of a felony stalking charge involving the same victim, and that his prior performance on probation was unsatisfactory in that the present offenses were committed while he was on probation. The court sentenced defendant to the aggravated term of four years in state prison for the assault offense plus a consecutive one year term for the stalking offense. The court found the following factors in aggravation: (1) The crime involved great violence, great bodily harm, and the threat of great bodily harm, which disclosed a high degree of cruelty, viciousness and callousness; (2) the victim was vulnerable in that defendant continued to physically abuse her after she was having difficulty moving due to her pain; (3) defendant threatened the victim repeatedly in regard to contacting the police; (4) defendant engaged in violent conduct, which indicated a serious danger to society; and (5) defendant suffered a prior felony conviction for stalking. The court found that these factors outweighed any mitigating factors including defendant's significant substance abuse problem.

II. DISCUSSION

Defendant contends that the trial court's imposition of the upper term deprived him of his right to a jury trial under *Blakely* because the sentencing decision was based on facts neither admitted by him nor found true by a jury. Defendant's claim was recently rejected by our Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, our Supreme Court determined that *Blakely* does not apply to California's determinate sentencing scheme. "[T]he judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial."

(*Black*, at p. 1244.) We are bound by the court’s ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P. J.

SEPULVEDA, J.